

NOS. 21310, 21313, and 21314
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 21310

CALIFORNIA GAS PRODUCERS ASSOCIATION,
INDEPENDENT OIL AND GAS PRODUCERS OF CALIFORNIA,
AND JADE OIL AND GAS COMPANY, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21313

THE STATE OF TEXAS, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 21314

TEXAS INDEPENDENT PRODUCERS &
ROYALTY OWNERS ASSOCIATION, et al., *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

**JOINT BRIEF OF INTERVENORS
SOUTHERN CALIFORNIA GAS COMPANY,
SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA,
AND PACIFIC LIGHTING SERVICE
AND SUPPLY COMPANY**

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Subject Index

	Page
I. Statement of interest	2
II. Statement of issues.....	3
III. Relevant facts	4
IV. Argument.....	11
A. The Commission considered the State of Texas proposal on the merits, but found the benefits from the PGT applications more in the public interest.....	11
B. PG&E's incremental costs for the instant PGT gas supplies were substantially lower..	14
C. Other conditions overwhelmingly favored the PGT proposal	16
D. El Paso's present available capacity is interruptible; PG&E consumers required firm capacity.....	18
V. Conclusion.....	20

Certificate of Counsel

Authorities Cited

Cases	Page
El Paso Natural Gas Company (Rock Springs), 30 F.P.C. 77 (1963).....	11, 12
Natural Gas Pipeline Company of America, et al., Docket No. CP 62-243.....	20
Pacific Gas Transmission Company, Opinion No. 495, p. 3, F.P.C. (1966).....	13
Pittsburgh, City of, v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956).....	11, 20
Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965).....	11
Transwestern Pipeline Company, et al., Opinion No. 500, F.P.C. (1966), issued July 26, 1966.....	13, 14, 15, 16, 17

Statutes

United States Codes, Title 15, Section 717f(e), Natural Gas Act, Section 7(e).....	20
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I.

STATEMENT OF INTEREST

Southern California Gas Company, Southern Counties Gas Company of California, and Pacific Lighting Service and Supply Company¹ (Pacific Lighting), serve natural gas in central and southern California. Their service territory is contiguous to the service territory of Pacific Gas and Electric Company (PG&E), which serves natural gas in central and northern California. PG&E receives part of its out-of-state gas supplies from Canada through a subsidiary, Pacific Gas Transmission Company (PGT). The granting of PGT's applications below to deliver additional gas to PG&E form the subject of these appeals.

Interconnections between pipeline systems of PG&E and Pacific Lighting exist in some locations in order to enable the two utility systems to render, should circumstances warrant, emergency gas service to each other. Additionally, Pacific Lighting is presently making temporary gas purchases from PG&E. Such arrangements are beneficial to the customers of both utilities and are approved by the California Public Utilities Commission. It follows that Pacific Lighting has an important interest in seeing that PG&E has adequate supplies of natural gas. Therefore, it intervened in the proceedings below in support of the PGT applications.

¹ Formerly known as Pacific Lighting Gas Supply Company.

II.

STATEMENT OF ISSUES

Although several issues have been raised by the petitioners in their opening briefs, Pacific Lighting assumes that the respondent, Federal Power Commission (Commission), and intervenor, PGT, will adequately address themselves to these issues. For us to rediscuss all the issues would be merely repetitious. However, on one issue, our knowledge of the underlying facts may be of possible aid to the Court. We are, therefore, limiting ourselves to the discussion of this issue. It is:

Did the Federal Power Commission err in rejecting the contention that Texas gas was available as a feasible alternative to the PGT project under consideration?

III.

RELEVANT FACTS

Before arguing the lack of merit in petitioners' position, it is first necessary to set the stage with the precise facts involved.

Prior to and during the hearing, the State of Texas (Texas) proposed that Texas gas was a suitable alternative supply to additional gas being sought by PGT in Canada. The other petitioners subsequently joined Texas in this argument.

In support of its position, Texas sought to introduce the testimony of Mr. Bob R. Harris (who stated, *inter alia*, that gas was being flared or wasted in the Permian Basin in contravention of the State's conservation laws) (R. 2909-10), and Mr. Barry Hunsaker, an employee of El Paso Natural Gas Company (R. 2920-33).

The latter testimony was not evidence prepared for this proceeding. Instead, it was evidence prepared by El Paso for another unrelated proceeding — the comparative hearing instituted by the Commission to resolve competitive pipeline company applications relative to supplying natural gas to the *southern California area*. (*Transwestern Pipeline Company, et al.*, Docket Nos. CP63-204, *et al.*).

The purpose of Mr. Hunsaker's testimony was to show that the alternative to the El Paso and Transwestern Pipeline Company projects, the proposed direct sale-industrial pipeline of Gulf Pacific Pipeline Company (Gulf Pacific), would parallel the existing systems of El Paso and Transwestern Pipeline Company (the pres-

ent suppliers of out-of-state gas to southern California) (R. 2920, *et seq.*), and that Texas Gulf Coast gas — Gulf Pacific's supply — has been traditionally transported to markets in the North and East and is relied on by consumers in these areas (R. 2923, *et seq.*). Additionally, the Hunsaker testimony outlined the nature and extent of some of the facilities El Paso proposed to build in the southern California supply proceeding. To put this evidence in proper context, it is necessary to note that the Hunsaker evidence offered by Texas was only *part of the evidence* submitted by El Paso in *Transwestern, supra*, on the facilities it intended to build. Earlier, El Paso in its case in chief had submitted evidence on facilities required to deliver an incremental supply of 250,000 Mcfd² of natural gas to the southern California market. Later, because there was in issue whether additional supplies over the initial 250,000 Mcfd were immediately required in southern California, El Paso filed evidence describing facilities needed to deliver an additional 325,000 Mcfd over and above the initial 250,000 Mcfd by means of facilities known as the Chaco-Needles line. Texas did not seek to introduce the testimony concerning the facilities for the initial 250,000 Mcfd nor the testimony on facilities for the Chaco-Needles line. Instead, it limited itself to only the Hunsaker testimony concerning an alternative means of delivering the additional 325,000 Mcfd to the southern California market by adding facilities to El Paso's existing system.

The cost of these particular additional facilities was stated to be \$77,810,000 over and above the cost of

² Mcfd means thousand cubic feet per day.

\$50,442,000 for the basic 250,000 Mcfd incremental supply (for a total of \$127,523,000) (R. 2932).

The Examiner excluded this evidence, but in doing so, he stated:

“Counsel for the state of Texas stated at the pre-trial the State of Texas would like to sponsor and incorporate by reference certain testimony and supporting exhibits from the record made in the transcript of the Trans-Western Pipeline Company, Docket No. CP63-204, the Gulf Pacific Case, as it is popularly known, to show that the State of Texas has an adequate supply of natural gas not now dedicated to an interstate sale, but they have no means of getting it transported to California.

“So, to quote counsel for the State of Texas, ‘We are going to volunteer El Paso Pipe Line to show the price of gas delivered at the California border. The Texas gas, according to counsel for the State of Texas, would be sold to El Paso and by it transported to California where it would be offered for sale.

“The testimony and supporting exhibits sought to be incorporated herein was given in the Gulf Pacific matter by an employee of and witness for the El Paso Natural Gas Company by the name of Barry Hunsacker [sic]. The record in Gulf Pacific has been closed and is presently under consideration by Examiner Kurtz. The testimony and supporting exhibits of the Witness Barry Hunsacker [sic] sought to be incorporated herein relate to the location, de-

sign and cost of facilities to enable El Paso to deliver an additional 325 MMcf per day of natural gas in the Gulf Pacific Case, as well as an additional 250 MMcf per day as proposed by El Paso in Docket No. CP64-76, which docket was also consolidated with the Gulf Pacific matter.

“These volumes are to be delivered if certificated to the southern California companies for distribution by them to the southern California markets, not to the San Francisco or northern California markets for which Pacific Gas Transmission and PG&E herein seek additional supplies of gas.” [R. 138-140]

He further indicated that the evidence would be before the Commission as an offer of proof and could be then reviewed by the Commission:

“And, as I have said before, if the Commission wants to look at this evidence, then you should make your offer of proof. It will then be before the Commission and perhaps by that time Gulf Pacific may also be before the Commission.

“There are no extraordinary circumstances here that the Examiner sees where a prompt decision on this question is required by the Commission or is necessary to prevent detriment to the public interest. The Examiner’s decision in this case undoubtedly will be reviewed by the Commission, perhaps by the Court, and if it is reviewed by the Commission and you make your offer of proof, as is provided by the rules of practice and procedure, then the evidence that you now seek to offer will be available to them.” [R. 816-7]

The Commission in refusing to upset the interlocutory ruling made by the Examiner also noted that the Texas evidence would be before it during its decision-making deliberations since an offer of proof had been made. The Commission stated:

“We note that the movants, with the approval of the examiner, have made an offer of proof with respect to the testimony which is the subject of the motion. It will be available for our consideration when the case comes before us for decision.” [R. 4892]

El Paso itself during the proceeding did not hide its position on being “volunteered.” At the pre-hearing conference, its counsel stated:

“MR. REIFSNYDER: El Paso has no application in this case; El Paso has no unfilled capacity by which we could make deliveries to Pacific Gas and Electric Company. Therefore, we are not a competing applicant in this case, it has not been El Paso who offered any testimony. We have not filed any prepared testimony. That is all I think I can contribute.” [R. 49]

On subsequent questioning by the Examiner during the course of the hearing to ascertain whether El Paso had changed its position, counsel replied:

“MR. REIFSNYDER: Yes, Your Honor, our position is still the same. We are not — we have no application on file, we have no unfilled capacity by which we could furnish any additional gas supplies to Pacific Gas and Electric Company. I have

listened to all of this debate about the Gulf Pacific testimony. My only knowledge of it, so far as the effort to incorporate any of it in this record, comes from the statement of Mr. Shivers at the prehearing conference, at which time he indicated the pages which he would wish to incorporate from Mr. Hunsacker's [sic] testimony and those exhibits. If it would be of any assistance to Your Honor, I have those pages here I believe and I have the exhibits, but beyond that I have nothing to add in addition to the statement that I made previously." [R. 425]

This position was confirmed later in the proceeding:

"As I stated previously on the record, El Paso has no excess capacity by virtue of which it could make deliveries at this time to Pacific Gas and Electric Company. Its system is operating virtually at capacity, in terms of the contracts which it now has." [R. 1377]

El Paso, subsequently, in briefs before the Examiner supported the application of PGT with the following language:

" . . . on the basis (1) of the evidence in this record that the incremental cost of the volumes sought to be purchased by PG & E will result in decreased costs of transportation to El Paso for gas coming through Kingsgate and (2) of the testimony in this record that this proposed expansion will not impair PGT's obligation to increase deliveries up to an aggregate of 300,000 Mcf per day to El Paso and (3) finally, of the assurance of the executives and other witnesses of both PG & E and PGT that

these additional volumes will not again result in cutbacks on purchases from El Paso at Topock with resulting financial detriment to El Paso, its already-connected producers and others affected by such cutbacks in the Southwestern area, El Paso does not object to the granting of the certificates here sought.” [Brief of El Paso Natural Gas Company, dated Nov. 15, 1965, p. 5]

IV.

ARGUMENT

A. THE COMMISSION CONSIDERED THE STATE OF TEXAS PROPOSAL ON THE MERITS, BUT FOUND THE BENEFITS FROM THE PGT APPLICATIONS MORE IN THE PUBLIC INTEREST.

City of Pittsburgh v. F.P.C., 237 F.2d 741 (D.C. Cir. 1956), and *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608 (2d Cir. 1965), relied on by petitioners, do not mean that the Commission must consider and discuss every alternative to a proposed project. The learning of these cases is that the Commission must scrutinize reasonable and feasible alternatives. To read into these cases a broader meaning requiring complete analysis of all alternatives, even those proposed by the uninformed or unknowledgeable, would heap an impossible administrative burden upon regulatory agencies.

The Commission itself recognized its duty in this regard in its *Rock Springs* decision,³ relied on by petitioners. That case further shows the nature of alternative evidence required in a major supply pipeline case. *Rock Springs* involved several applications to serve additional natural gas to the market in southern California. The "Rock Springs" project involved the construction of a pipeline from certain gas fields in the Rocky Mountain area near Rock Springs, Wyoming, to California. In denying that project, the Commission stated:

³ El Paso Natural Gas Company, 30 F.P.C. 77 (1963).

“The most important respect in which this project fails to meet the requirements of the public convenience and necessity is revealed in the evidence showing that other means of supplying the California market would be less costly. *The principal evidence on this question was presented by Transwestern, although some evidence was introduced by El Paso and the staff.*” [30 F.P.C. 77, 85 (Emphasis added).]

The principal evidence of the alternative to which the Commission referred was introduced by a pipeline company which had intervened in the proceedings (Transwestern Pipeline Company). The evidence was of a comprehensive and detailed nature including not only construction costs of the facilities proposed, but also incremental and rolled-in costs of the gas to be delivered. Thus, in *Rock Springs, supra*, the Commission had before it evidence of a physical alternative proposed by a pipeline company which was ostensibly ready, willing and able to perform the service.

This is to be contrasted with the evidence of the so-called alternative sought to be introduced in the case below. The evidence sought to be introduced here was from a separate and completely unrelated proceeding, and it was not being introduced by a pipeline company willing and able to render service. Rather, it is being introduced by a non-pipeline, the State of Texas, in an attempt to “volunteer” El Paso to supply the volumes of gas proposed to be supplied by PGT. Moreover, as earlier noted,⁴ El Paso, through its counsel, on a number

⁴ Pages 8 and 9.

of occasions, specifically disavowed its willingness and *its ability* to provide the volumes of gas which is the subject of the instant case.

Even though the evidence proposed by Texas had these shortcomings, it is apparent that the Commission did consider and weigh the possibility of El Paso providing alternative supplies, as the commission indicated it would (R. 4892). This is clear by the following statement in the Commission's Opinion:

“Unlike the *Rock Springs* proceeding, the record in this case does not demonstrate that alternative methods exist for providing the needed volumes of additional gas at rates and under conditions more advantageous than those which will be achieved by certification of PGT's instant application.⁵

In the testing of the sufficiency of the evidence on this issue, it should be noted that the Commission had before it for decision at the time the instant decision was prepared the enormous record in *Transwestern, supra*. The Commission, in its expertise, could refer to this evidence; and by so referring, it could flesh out the inadequacies of Texas' skeletal proposal to the advantage of petitioners. With the issuance of Opinion No. 500,⁶ which decided *Transwestern, supra*, this Court can test the adequacy of the Texas proposal in much the same

⁵ Pacific Gas Transmission Company, Opinion No. 495, Mimeo p. 3,F.P.C.(1966) (R. 5259).

⁶ Pacific Gas Transmission Company, Opinion No. 495, F.P.C. (1966), was issued June 15, 1966. Transwestern Pipeline Company, *et al.*, Opinion No. 500, F.P.C. (1966), was issued July 26, 1966.

manner as the Commission did. The test does not take long and is dispositive of the issue raised.

**B. PG&E's INCREMENTAL COSTS FOR THE
INSTANT PGT GAS SUPPLIES WERE SUB-
STANTIALLY LOWER.**

In the statement from the Commission's PGT Opinion quoted above, the alternatives proposed by others were found wanting in at least two respects:

1. Rates, and
2. Less advantageous conditions.

With respect to rates, it is petitioners' contention that the rate which El Paso could deliver Texas gas to PG&E at the California-Arizona border was 22 cents per Mcf, compared to the cost to PG&E for the PGT gas at the California-Oregon border of about 24 cents. The 22-cent figure is a misstatement of not only the facts in this proceeding, but also the facts in *Transwestern, supra*, from which the figure was derived.

In *Transwestern, supra*, El Paso did present testimony that *its* incremental cost of delivering an additional 575,000 Mcfd — the 250,000 Mcfd basic application plus the 325,000 Mcfd additional supply discussed earlier — was 22 cents per Mcf. However, this means that *El Paso's* overall total additional cost for delivery of these added volumes is 22 cents per Mcf. This is not the cost to PG&E since joint facilities serving other customers were to be used to make these additional sales. The savings resulting from these additional volumes must be spread over the sales to all of the customers, and all who use the joint facilities must benefit. The Commission recognized this fact, and it had before it in *Transwestern*,

supra, sufficient information to compute and compare the incremental price to PG&E for added volumes from El Paso.

PG&E's rate at 100 percent load factor has been for some time past 30.08 cents per Mcf at 14.9 psia. This rate is equal to 29.74 cents per Mcf at 14.73 psia. El Paso proposed a reduction in its border price if its application to deliver the initial 250,000 Mcf to Pacific Lighting were granted. In Appendix B, Schedule 2, Sheet 1 of 2, to Opinion 500, the Commission shows that this reduction results in a border price of 29 cents.

El Paso further indicated that if its Chaco-Needles project for the sale of an additional 325,000 Mcf to Pacific Lighting over and above the initial 250,000 Mcf were granted, a further reduction of ¼ cent in its price might possibly result. Assuming *arguendo* that this further reduction could be made available with the Texas "volunteered" El Paso project which would involve sales of additional supplies to PG&E, the incremental cost to PG&E of the added volumes with these assumptions could be computed as follows:

$$\begin{array}{rcl}
 1,239,000 \text{ Mcfd} \times 365 \times 28.75\phi & = & \$130,017,563 \\
 1,037,000 \text{ Mcfd} \times 365 \times 29.00\phi & = & \underline{109,766,450} \\
 & & \$ 20,251,113 \\
 \hline
 \frac{\$20,251,113}{202,000 \text{ Mcfd}^7 \times 365} & = & 27.47\phi \text{ per Mcf} \\
 & & \text{(incremental cost to PG\&E)}
 \end{array}$$

The incremental cost above could be affected by other possible reductions to El Paso's border price. In *Trans-*

⁷ 202,000 Mcfd at 14.73 psia equals 200,000 Mcfd at 14.9 psia.

western, supra, the Commission noted that further downward adjustments in El Paso's border price may result from the effect of lower gas purchase prices resulting from the Permian Basin decision, a lower rate of return, and the flow through of tax benefits resulting from liberalized depreciation.⁸ It has been estimated that the Permian Basin area rate case could result in a 1 cent per Mcf reduction in purchased gas costs, and that the downward adjustment resulting from a lower rate of return and the flow through of liberalized depreciation could be an additional $\frac{3}{4}$ cent. Assuming again for purposes of argument that all of these reductions will be available at the maximum amounts, the assumed 29 cent border price shown by the Commission in Appendix B, Schedule 2, Sheet 1 of 2 would become 27.25 cents. Using the 27.25 price in place of the 29 cent price, and again assuming *arguendo* that an additional $\frac{1}{4}$ cent reduction would flow from added volumes to PG&E in the manner discussed above, the incremental cost would be 25.7 cents. Thus, the range of incremental cost is 25.7 cents and upward which is much higher than the incremental cost to PG&E of 22.6 cents to 23.6 cents per Mcf for the new PGT gas.

C. OTHER CONDITIONS OVERWHELMINGLY FAVORED THE PGT PROPOSAL.

With respect to the other conditions, the record is equally clear and the contrast more convincing.

Take, for example, a comparison of the cost of facilities to deliver additional gas. The cost of PGT's facilities and *related Canadian facilities* to deliver the 200,000

⁸ Transwestern Pipeline Company, *et al.*, Opinion No. 500, Mimeo p. 43, FPC (1966).

Mcf/d required by PG&E to the California-Oregon border are estimated to be \$24,974,000, or \$125 per Mcf of daily capacity added (Ex. 19, p. 2, R. 2411). This compares with El Paso's cost for its initial 250,000 Mcf/d delivery of \$50,442,000 or \$200 per Mcf of added capacity (R. 2932).⁹ Furthermore, although precise cost figures are not available, it is clear that the cost of bringing El Paso gas from Topock on the Arizona border to the Bay area load center exceeded the minimal cost for transporting the same amount of gas purchased from PGT at the Oregon border to the same load center.¹⁰

Another example of the comparison is the supply of gas. The applicant presented a full showing on supply and reserves; Texas did not.

A further advantageous condition to the PGT project is the savings resulting to other customers of PGT in the Pacific Northwest. PGT's witness testified that the in-

⁹ Comparing El Paso's costs for the initial 250,000 Mcf/d delivery is not an appropriate comparison. However, it is the one most generous to petitioners' contentions. Under the provisions of Transwestern Pipeline Co., *et al.*, Opinion No. 500, F.P.C., (1966), these facilities are now being devoted to added deliveries to Pacific Lighting. The more correct comparison should use the \$77,810,000 cost for the added 325,000 Mcf/d capacity testified to by Mr. Hunsaker (R. 2932). This results in a cost of \$239 per Mcf of added capacity.

¹⁰ The cost of incremental supplies delivered to the load center in Antioch is shown in Exhibit 61, page 2 (R. 3051). These costs are less than the costs of El Paso gas at the Arizona border before even considering the cost of transporting the Texas gas some 400 miles to PG&E's load center. Added facilities for Arizona border to load center deliveries are discussed at R. 2546.

creased deliveries by PGT will reduce the overall rate for gas transported for sale in the Northwest by a total of \$2,500,000 for the years 1966 through 1970 (R. 1432). For this reason the project was supported by the regulatory agencies of the States of Oregon, Washington, and Idaho.

D. EL PASO'S PRESENT AVAILABLE CAPACITY IS INTERRUPTIBLE; PG&E'S CONSUMERS REQUIRED FIRM CAPACITY.

Petitioner, "California Gas Producers Association" adds a further twist to the El Paso-as-an-alternative theory. This petitioner contends that the added supplies needed by PG&E are available from El Paso without the construction of any additional out-of-state facilities (California Gas Producers' Brief, pp. 24-27).

The information used by this petitioner to support this position was provided by El Paso's counsel during the hearing. These figures, which are compiled in Exhibit No. 46 (R. 2880), show that on a few isolated days — three only are shown in the exhibit — El Paso did, in fact, provide volumes of gas to PG&E and Pacific Lighting in excess of its contractual commitments.

However, the furnisher of the information — El Paso's counsel — was fully aware of the misleading use to which these figures could be put. He, therefore, issued the caveat that this capacity was not available every day. He cautioned:

"MR. REIFSNYDER: I have no objection to the figures proposed by the State of Texas going into the record if Your Honor feels that they are relevant,

but I wish the record to reflect, in connection therewith, that on cold winter days, the requirements of El Paso's customers east of California are such that curtailment of the interruptible and portions of the firm industrial segments thereof are required and on such days El Paso would not be able to deliver to its California customers gas over and above its firm quantities.

* * *

"These figures are correct, and I did furnish them to counsel for the State of Texas in accordance with the request which he made on the record earlier in this hearing. I have no objection to those figures going in, if my qualifying remarks are also made a part of the record." [R. 1377]

It is thus apparent that the excess capacity which petitioner believes exists is only available for interruptible volumes. The record demonstrates, however, that PG&E's needs are for firm deliveries. Capacity available now and then on an interruptible basis will not satisfy the firm needs of consumers, who rely on their gas appliances daily for cooking and heating.

V.

CONCLUSION

In conclusion, we note that Section 7 of the Natural Gas Act requires that an *applicant* be both *able* and *willing* to perform the service for which authorization is sought.¹¹ El Paso, as the facts already show, was not an applicant and was neither *able* nor *willing* to provide the service required by the consumers.

If the Commission had by some chance found that the Texas evidence showed a feasible alternative, it could not have directed El Paso to render the service.¹² All it could have done would have been to reject the application of PGT.¹³ To have taken that course when there was uncontradicted evidence of a need for additional firm supplies and uncontradicted evidence showing that the granting of the PGT authorization would benefit gas consumers in four states by providing lower costs would have been contrary to the public interest, and reversible error.

¹¹ “. . . [A] Certificate shall be issued to any qualified applicant therefor . . . if it is found that the applicant is *able* and *willing* properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the Requirements, Rules, and Regulations of the Commission thereunder, . . .” [15 U.S.C. §717f(e).]

¹² Natural Gas Pipeline Company of America, *et al.*, Docket No. CP62-243 (Order issued Feb. 24, 1966).

¹³ City of Pittsburgh v. Federal Power Commission, 237 F.2d 741 (D.C. Cir. 1956).

We submit the Commission's decision was more than appropriate under the circumstances and it should be affirmed.

Respectfully presented,

SOUTHERN CALIFORNIA GAS COMPANY

SOUTHERN COUNTIES GAS COMPANY
OF CALIFORNIA

PACIFIC LIGHTING SERVICE AND
SUPPLY COMPANY

By ROGER J. NICHOLS

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Roger J. Nichols

